MALAYAN BANKING BHD

v.

HONG SEK MEE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CIVIL APPEAL NO: R2-11-16-96]
16 JUNE 1998

BAILMENT: *Contract of bailment - Loss of valuables left in safe deposit box with bank - Whether relationship with bank is that of bailor and bailee or merely that of licensor and licensee*

CONTRACT: *Construction - Agreement for rental of safe deposit box - Whether a contract of bailment - Contracts Act 1950, ss. 101 & 102*

This was an appeal by the appellant ('the bank') against the decision of the learned magistrate allowing the respondent's claim for the loss of her valuables in the safe deposit box maintained with the bank.

The respondent was one of the customers of the bank at its Tun H.S. Lee branch and had entered into a hiring agreement with the Bank for the rental of a safe deposit box. Clause 3 of the said hiring agreement provided that "The Agreement for Hire shall not confer on the hirer any greater or other interest than a licence to use the box ..." and cl. 4 thereof provided that "The bank shall not be deemed to become a bailee of the contents of the box ...".

The issue before the court was whether the relationship between a hirer of a safe deposit box and the bank is that of bailor and bailee or licensor and licensee.

Held:

[1] The relationship between the hirer of the safe deposit box and the bank was only that of a licensor and a licensee and nothing more. The relationship was not of a bailment. The alleged bailment was never contemplated by the parties and the relationship of the parties does not qualify as one of bailment as provided under s. 101 of the Contracts Act 1950 or under common law. What was agreed in the hiring agreement was only a licence to use the safe deposit box.

[2] In the present case, there was an express provision in cl. 4 of the hiring agreement wherein it was specifically contracted that the bank shall not be deemed to become a bailee of the contents of the box and the nature and value of such contents shall be no concern of the bank. Clause 4 was preceded by cl. 3 which expressly spells out that the hiring of the box shall not confer on the hirer any greater or other interest than a licence to use the box. The clauses were very clear and unequivocal and not ambiguous in their meaning. Therefore, the court must give effect to the terms of the agreement.

[3] The basic elements of bailment were not present in this case as: (a) there was no delivery of the alleged valuables to the bank upon a contract to constitute bailment; (b) there was no mental element on the side of the bank to acknowledge the delivery of the alleged valuables or to contract to hold them as a bailee; (c) the bank did not have exclusive possession of the alleged valuables as the respondent, at all material time, assumed custody and control over the contents of the safe deposit box and (d) there was no agreement, express or implied, to redeliver the alleged valuables to the respondent when the purpose was accomplished.

[4] The bank, by disqualifying itself as bailee under cl. 4 of the hiring agreement, had given due and proper notice to the respondent of its position and the respondent can only sue the bank for breach of contract or tort and surely not in bailment.

[5] To hold that there is no bailment does not impose any hardship on a depositor, for in a claim for damages for negligence, it does not require the bank to have possession of the articles deposited. In other words, while there is no 'contract' of bailment, a bank can still be liable for negligence in tort. However, since the respondent's action in the present case was solely grounded in bailment which she failed to prove, the court had no alternative but to allow the appeal.

[Appeal allowed with costs; orders of learned magistrate set side.]

Cases referred to:

Addiscombe Garden Estate Ltd v. Crabbe [1958] 1 QB 513 ***(cit)***
Ashby v. Tolhurst [1937] 2 All ER 837 CA ***(refd)***
Banque Canadienne Nationale v. Donato Mastracchio [1962] DLR 53 ***(not foll)***
Fairline Shipping Corp v. Adamson [1975] 1 QB 180 ***(refd)***
Midland Silicones Ltd v. Scruttons Ltd [1960] 2 All ER 737 ***(refd)***
Morgan v. Citizens' Bank of Spring Hope [1925] 42 ALR 1299 ***(refd)***
National Safe Deposit Co v. Stead [1914] 232 US 58 ***(not foll)***
Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All ER 556 ***(refd)***
Sia Siew Hong v. Lim Kim Chian [1996] 3 CLJ 26 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 101, 102

Other sources referred to:
Atkin's Court Forms, vol 6, 2nd edn, p 170
Bailment, NE Palmer, 2nd edn 1991, p 3
Halsbury's Laws of England, 4th edn, para 1501
Malaya Law Review (1964), Alice Tay, p 245
The Law of Banking in Singapore & Malaysia, Dr Myint Soe

For the appellant - Andrew KC Ng; M/s Yeo & Yeo
For the respondent - David Hoh; M/s Lim & Hoh

Reported by Ling Hea Hoon

JUDGMENT

Nik Hashim J:

This appeal involves an interesting legal issue. The issue is whether the relationship between the hirer of the safe deposit box and the bank is that of bailor and bailee or licensor and licensee.

The appellant (the Malayan Banking Berhad – the bank) is appealing against the decision of the learned magistrate in allowing the respondent's claim for the loss of her valuables in the box amounting to RM15,244 with interest at 8% per annum. The respondent is one of the nearly 2,000 customers of the Bank at its Jalan Tun H.S. Lee branch who has entered into a hiring agreement with the Bank for the rental of a safe deposit box at a fee of RM45 per year. The respondent has been a hirer of the box since 1977 and was given a box numbered A277. On 22 May 1992, the bank's clerk (DW4) on a round check of the safe deposit box area found that the vault door to the respondent's box was ajar and wedged in and thus could be opened with a little force. When DW4 pulled the vault door, the lock lever was jutting out, indicating that it was in a locked position. The deposit box would have been properly locked if the lock lever had entered into the lock slot of the box and not simply wedged in. The respondent was then requested by the bank to call at the bank and was told that her deposit box was not properly locked. Hence, the respondent's claim for the alleged loss of the contents in her box, which she said contained her jewelleries.

It is not in dispute that two keys are required to open the box, one of which is the bank's guard key and the other is the customer's key. The locking of the box is the responsibility of the customer as only the customer's key can operate the lock lever of the vault door. The respondent is the sole user of the box.

The learned magistrate in his judgment, ruled that there was a contract of bailment in law between the parties, despite the written agreement to the contrary.

Encik Andrew Ng, learned counsel for the bank, contends forcefully that there is no contract of bailment in the case. The respondent having entered into a hiring agreement with the bank could only sue for a breach of contract for allegedly safeguarding the respondent's box or in tort for negligence or conversion. To allege bailment, it is not enough for the respondent to unilaterally state that she has entrusted the goods to the bank when there was no such corresponding mental element on the bank to accept as such. The possession conferred must be exclusive and retention of control of the goods by the respondent will prevent a bailment from arising. According to him, the bank is merely a depository of the box while the respondent herself at all material times maintains exclusive control to the contents of the box as only she has the requisite keys to open the box.

Encik David Hoh, learned counsel for the respondent, on the other hand, in support of the finding of the learned magistrate, argued with great persuasion that there was a relationship of bailor and bailee between the bank and the respondent in this case and as such, the bank was responsible for the loss, and cited the United States of America Supreme Court case of *National Safe Deposit Co. v. Stead* [1914] 232 US 58, 58L ed. 504, 34 Sup. Ct. Rep. 209, and the Canadian Supreme Court case of *Banque Canadienne Nationale v. Donato Mastracchio* [1962] DLR 53, in support, and urged the court not to interfere with the magistrate's finding.

In order to resolve the rival arguments, I consider it necessary to reproduce the relevant parts of the agreement and then examine the law of bailment before deciding whether there is in fact a relationship of bailment between the parties. The terms of the agreement read as follows:

Conditions Governing The Hiring Of Safe Deposit Boxes

1. In these conditions, the expression "Box" means the Safe Deposit Box agreed to be hired by the Hirer ... and the "Bank" means the Malayan Banking Berhad and its branches where such services are available.

2. To hire a box, the Hirer will be required to pay rental in advance, together with a deposit for his keys and shall enter into an Agreement with the Bank for the hiring of the Box under the following conditions.

3. The Agreement for Hire shall not confer on the Hirer any greater or other interest than a licence to use the Box during the term of hire for the deposit of articles of a suitable nature in accordance with these conditions.

4. The Bank shall not be deemed to become a bailee of the contents of the Box or any part thereof, nor shall it be affected by notice of any trust or equity attaching to such contents or any part thereof. Subject to the provisions of condition 7 hereof, the nature and value of such contents shall be no concern of the Bank.

5. Only the Hirer shall be permitted access to the Box ...

6. Each Box shall (have) two sets of keys, namely the A keys which shall be kept by the Bank, and the B keys which shall be delivered to the Hirer on payment of a deposit ...

7. The Hirer shall not use or permit the Box to be used for the deposit of any liquid or anything of an explosive ... or for any other purpose than for the deposit of articles or documents of value ... the Hirer will on demand permit the Bank to inspect the contents of the Box for the purpose of ensuring that this condition is being complied with.

Section 101 of the Contracts Act 1950 states:

> A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Section 102 goes on to say:

> The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

'Bailment' from the French bailler, 'to deliver' says Blackstone, 'is a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee' (2 Bl. Comm. 13th Ed., 1800), at p. 451).

According to *Halsbury's Laws of England* 4th edn at para. 1501 in order "to constitute a bailment, the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor), to another person (the bailee) in order that the latter may keep the same or perform some act in connection therewith, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form".

In vol. 6 of *Atkin's Court Forms* 2nd Edn at p. 170, the meaning of bailment is similarly defined and it goes to say at para. 2 that, "The possession conferred must be exclusive and retention of control of a chattel by an owner will prevent a bailment arising." In *Midland Silicones Ltd. v. Scruttons Ltd.* [1960] 2 All ER 737, CA at p. 740, it was held on the facts that there was no such exclusive possession on the part of the defendant as would support a bailment. Whereas in *Fairline Shipping Corporation v. Adamson* [1975] 1 QB 180, it was held that the defendant was not a bailee as he did not have exclusive possession of the goods and was only found liable in negligence for breaching his duty of care.

The learned author N.E. Palmer in *'Bailment'* 2nd ed. 1991 at p. 3:

> "a bailment cannot arise without a certain mental element on the part of the putative bailee ... a bailment comes into being whenever one person is knowingly and willingly in possession of goods which belong to another.

Dr. Myint Soe in *'The Law of Banking in Singapore & Malaysia'* comments on the relationship of the customer and the bank *vis-a-vis* safe deposit boxes and her views are as follows:

> (1) The old learning as to whether the bank is a bailee or not is no longer relevant as one has to go by what the present document says ie, the hiring agreement.
>
> (2) The relationship of the parties may be that of lessor and lessee but the liability of a bank is at least as high as those of a bailee for safekeeping. Thus, they may be no contract of 'bailment' but a bank can still be liable for negligence in tort.
>
> (3) Accordingly, the customer will have to sue for breach of the duty of care in contract or in tort (ie, negligence).

The learned author also quoted Alice Tay who wrote an article in the *Malaya Law Review* (1964) at p. 245 on the same subject and arguing that the relationship of the parties could be one of licensor and licensee and formulates her own view on the liability of bank as follows:

> Its liability rests on the express or implied terms of a specific contract with the renter, on the fact that the company holds itself out as providing a very high degree of protection, such as is normally associated with vaults, safes and banks.
>
> Its liabilities under such undertakings (where there has been consideration) are at least as high as those of a bailee for safe-keeping, but this does not mean that the company thereby accepts bailment.

There is no doubt that Alice Tay's views deserve considerable respect. She also points out that to hold that there is no bailment does not impose any hardship on the depositor, for in a claim for damages for negligence it does not require the bank to have possession of the articles deposited. In other words, while there is no 'contract' of bailment, a bank can still be liable for negligence in tort.

Encik David Hoh urged the court to follow the USA's case in *National Safe Deposit Co. (supra)* in determining the present case where in that case the Supreme Court upon holding that the relationship between the customer of the safety deposit box and the bank is one of a bailor and bailee, said:

> We think it clear that where a safety deposit box or safe, and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables, and that the fact that the safety deposit company does not know, and that it is not expected it shall know, the character or description of the property which is deposited in such safety deposit box or safe does not change that relation, any more than the relation of a bailee who should receive for safe-keeping a trunk from a bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor, although the obligation resting upon the bailee with reference to the care he should bestow upon the property in the trunk might depend upon his knowledge of the contents of the trunk. Obviously, the bailee would be in possession of the trunk and its contents, and no amount of argument would demonstrate that, while the trunk was in possession of the bailee, its contents were in the possession of the bailor, solely by reason of the fact that the bailor of the trunk retained the key and the bailee did not have access to the trunk. We are of the opinion that the relation of bailee and bailor exists between the appellant and its lessees, and that the deposit of the securities and valuables by its lessees in rented safety deposit boxes or safe is a bailment, and that the law applicable to bailments generally applies to such transaction and to such property.

Learned counsel also cited another American case of *Morgan v. Citizens' Bank of Spring Hope* [1925] 42 ALR 1299 in support. In that case at p. 1301 the North Carolina Supreme Court said:

> The fact that the safety deposit box can be unlocked and opened, and access had to its contents, only by the joint action of the customer, who has possession of the individual key, and of the bank, which has possession of the master key, does not affect the character of the relationship.

On perusal of all the authorities, and after considering the submissions of the learned counsel from both sides, and having regard to the facts of this case, I am unable to follow the American decisions which hold the view that the

relationship between the hirer of the safe deposit box and the bank is one of bailment. The Canadian case of *Banque Canadienne Nationale, (supra)* too is not quite applicable here as the cause of action in that case was based on negligence. It is my considered judgment and I so hold that the relationship between the hirer of the safe deposit box and the bank in the instant case is only that of a licensor and a licensee and nothing more. The relationship is not of a bailment. The alleged bailment was never contemplated by the parties and the relationship of the parties does not qualify as one of bailment as provided under s. 101 of the Contracts Act or under common law. While it is true that in the construction of contract, the court is not bound by the labels affixed onto a contract (*Sia Siew Hong v. Lim Kim Chian* [1995] 3 MLJ 141; *Addiscombe Garden Estate Ltd. v. Crabbe* [1958] 1 QB 513), nevertheless the court has the duty to construe it as a whole to determine its true nature. In the present case, there is an express provision in cl. 4 of the hiring agreement wherein it was specifically contracted that the bank shall not be deemed to become a bailee of the contents of the box and the nature and value of such contents shall be no concern of the bank. Clause 4 is preceded by cl. 3 which expressly spells out that the hiring of the box shall not confer on the hirer any greater or other interest than a licence to use the box. The clauses are very clear and unequivocal and indeed certainly not ambiguous in their meaning. Therefore, the court must give effect to the terms of the agreement. It is trite law that parties are bound by the contract entered into between themselves, and they should not be allowed to change the legal nature of the agreement just because it suits them. The hiring agreement was drafted the way it is in order to remove any doubt with regard to the position of the parties in the event of a dispute such as this. Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 1 All ER 556 opined:

> A basic principle of common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.

Otherwise the whole banking industry would be thrown into chaos and they would be forced to stop this valuable service to their customers if they were considered to be bailees when it has been precisely stated in the hiring agreement and contracted that "they are not deemed to become a bailee of the contents of the box". As bailee of goods delivered to them by the bailor,

the duty to explain the alleged loss and burden of proof would be on them instead of the bailor, who simply has to say, "I have made a demand and there was no return of my valuables bailed to you". In my view, it is because of this anticipation by the banks in general that the relationship between the customer and bank was treated to be that of licensor and licencee. What was agreed in the hiring agreement was only a licence to use the box not unlike the situation in *Ashby v. Tolhurst* [1937] 2 All ER 837, CA where it was held that, "the relationship of the parties was that of licensor and licensee, and not that of bailor and bailee, and there was therefore no obligation upon the defendant towards the plaintiff in relation to the car left in the car park". Similarly in the present case, possession of the alleged contents of the box was never assumed by the bank and the respondent's contention that "once the door is locked, that is the effect of putting the goods in the possession of the bank" and therefore connotes the essential elements of bailment, could not be further from the truth. The hirer, PW2 under cross-examination too testified that she is the only one who has access to the contents of the box and the control rests entirely with her and she has never relinquished exclusive possession to the contents of the box to the bank or anyone else.

Furthermore, I agree with Encik Andrew Ng that the basic elements of bailment are simply not present in this case:

(i) there was no delivery of the alleged valuables to the bank upon a contract to constitute bailment;

(ii) there was no mental element on the side of the bank to acknowledge the delivery of the alleged valuables or to contract to hold them as a bailee. (See "bailment" by NE Palmer.)

(iii) the bank did not have exclusive possession of the alleged valuables as the respondent, at all material time assumed custody and control over the contents of the box as only she (PW2) had the keys to control the opening and closing of the vault door. In effect, the bank cannot be considered to be a bailee as it does not have the exclusive possession of the alleged valuables as the respondent can at any time during banking hours avail herself to the contents of the box. Thus, possession of the alleged valuables were never passed to the bank which is one of the determining factors to imply a contract of bailment in the absence of a special contract. Thus, it was decided in *Federal Commissioner of Taxation v. Smorgon and Others* [1977] 16 ALR 721, that the bank has neither the physical custody nor control over the contents of the box.

(iv) there was no agreement, express or implied to redeliver the alleged valuables to the respondent "when the purpose is accomplished".

For the above reasons, the irresistible conclusion that can be drawn of the whole hiring arrangement is that it cannot be one of bailment as supposedly framed by the respondent in her statement of claim. The bank by disqualifying itself as bailee under cl. 4 has given due and proper notice to the respondent of its position and the respondent can only sue the bank for breach of contract or tort and surely not in bailment.

As adverted to earlier, there was no intention, whether express or implied to treat the hiring of the box as bailment and the respondent certainly cannot be allowed to assign a fresh and new meaning to the hiring agreement unilaterally and urge the court to ignore cl. 4 in its entirety. The respondent can only imply a case of bailment in the absence of a special contract and only when all the necessary ingredients of bailment discussed above are present.

Therefore, in the light of the evidence, I hold that the finding of the learned magistrate that there was a bailment is perverse and wrong in law. Since the respondent's action is solely grounded in bailment which she failed to prove, the court has no alternative but to allow the appeal with costs to the appellant bank here and below, and the order of the learned magistrate is hereby set aside. The deposit paid is to be refunded to the appellant.